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No. 06-939

IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, *ET AL.*,

Petitioners,

v.

EDMUND G. BROWN JR., *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY FOR PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Split With The Second Circuit Is Not Altered By The Misleading Use Of The Word "Facial" 2

B. The Seventh and Ninth Circuits Take Different Approaches To NLRA Preemption 7

C. The Preemption Issue Can And Should Be Resolved Now 8

TABLE OF AUTHORITIES

Page

Cases

Clark v. Martinez, 543 U.S. 371 (2005) 7
Chamber of Commerce v. Reich, 57 F.3d 1099 (D.C. Cir. 1995) 9
Employers Ass'n, Inc. v. United Steelworkers, 32 F.3d 1297 (8th Cir. 1994) 9
FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238 (1986) 9
Healthcare Ass'n of N.Y. State, Inc. v. Pataki, 471 F.3d 87 (2d Cir. 2006) 2-3, 4
Int'l Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982) 10
Lodge 76, Int'l Ass'n of Machinists & Aerospace Worker v. Wis. Employment Relations Comm'n, 427 U.S. 132 (1976) 1, 2, 3, 5, 9
Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 325 F.3d 879 (7th Cir. 2003) 9
Metro. Milwaukee Ass'n of Commerce v. Milwaukee County, 431 F.3d 277 (7th Cir. 2005) 7
In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996) 3
Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983) 10
Rust v. Sullivan, 500 U.S. 173 (1991) 5
San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) 1, 2, 3, 5, 9
Sec. Indus. Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989) 8
Smith v. Nat'l Steel & Shipbuilding Co., 125 F.3d 751 (9th Cir. 1997) 8
United States v. Rodriguez-Lara, 421 F.3d 932 (9th Cir. 2005) 3
United States v. Salerno, 481 U.S. 739 (1987) 1, 5

TABLE OF AUTHORITIES
(Continued)

Page

Federal & State Law

29 U.S.C. § 158(c) 8
California Assembly Bill No. 1889 ..... *passim*
N.Y. Labor Law § 211-a 3

Other Authorities

NLRB *Amicus* Brief, *Chamber of Commerce v. Lockyer* (9th Cir. Nos. 03-55166, 03-55169), *available at* 2003 WL 22330725 8

The nation's two largest commercial centers, California and New York, have enacted similar laws that restrict employers' ability to speak to their employees about union organizing. The United States Courts of Appeals for the Second and Ninth Circuits have issued detailed opinions addressing whether those state statutes are preempted by federal labor law. Respondents *concede* that the rationale of the *en banc* Ninth Circuit court conflicts with that of the Second Circuit. It is also undisputed that it conflicts with the expert views of the National Labor Relations Board, which has specifically stated that California's law conflicts with federal law. Finally, at least 15 other states are poised to enact similar laws depending on the outcome of this litigation. Based solely on these factors—on which there is no disagreement—certiorari should be granted.

Respondents' only response is to speculate that, either on remand or in an entirely new case, the Ninth Circuit might somehow reconcile its holding with that of the Second Circuit. Even if true, certiorari would still be warranted for the reasons stated. But this simply is not true.

The Ninth Circuit did not—despite respondents' repeated and misleading references to "facial" challenge—decide the preemption issue under the standard set forth in *United States v. Salerno*, 481 U.S. 739, 751 (1987). Rather it held, as a matter of law, that neither *Garmon*, *see San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), nor *Machinists*, *see Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n*, 427 U.S. 132 (1976), preemption speaks to noncoercive employer speech, so that states are free to regulate such speech through spending restrictions. That (sweeping) holding is law of the circuit, and, absent reversal, it would foreclose the district court and future Ninth Circuit panels from holding that California Assembly Bill 1889 is preempted.

Thus, contrary to respondents' suggestion, this clear split has immediate, tangible, and dramatic consequences. If allowed to stand, AB 1889 will encourage numerous other states to try their hands at refashioning the union organizing process, effecting a sea change in longstanding national labor policy. Nor would percolation provide further illumination of the concrete legal issue presented. This issue has been thoroughly explored in the Ninth Circuit's three decisions in this case, the decisions of the Second and Seventh Circuits, and the *amicus* brief of the NLRB. More importantly, delaying certiorari review would exacerbate the problem, forcing national and international businesses to follow 50 different standards depending on the predilections of the local jurisdiction. This is precisely what Congress intended to avoid in federalizing labor-management relations law.

In short, this Court should resolve the division amongst the circuits and NLRB to prevent the balkanization of the labor laws—a result directly at odds with Congress's intent in enacting a uniform National Labor Relations Act.

A. The Split With The Second Circuit Is Not Altered By The Misleading Use Of The Word "Facial"

The Ninth Circuit determined that AB 1889 is not subject to preemption under either *Garmon* or *Machinists*. *See* Pet. App. 23a, 32a (holding *Garmon* inapplicable because "Section 8(c) does not *grant* employers speech rights," which is thus not "an activity arguably protected" by the NLRA) (emphasis in original); Pet. App. 19a (holding *Machinists* inapplicable because "employer speech in the context of organizing" is not a "zone[] . . . left free from *all* regulation") (emphasis in original). In light of that holding, the Ninth Circuit flatly concluded that "sections 16645.2 and 16645.7 of AB 1889 are not preempted under either *Machinists* or *Garmon*." Pet. App. 36a.

The Second Circuit expressly rejected the Ninth Circuit's interpretation of *Garmon* and *Machinists*. *See Healthcare Ass'n of N.Y. State, Inc. v. Pataki*, 471 F.3d 87, 100 (2d Cir.

2006) (holding *Garmon* applicable because "section 8(c) does protect employer speech in the unionization campaign context"); *id.* at 107 (holding *Machinists* applicable because Congress intended "to leave employer speech largely unregulated"). It held that New York Labor Law section 211-a, which imposes similar speech restrictions, was preempted insofar as it restricts "the use of money that cannot be considered State funds," such as money that employers earn under fixed-price contracts, cost-based reimbursements that exclude union-related expenses, and programs in which federal funds pass through the state. *Id.* at 106.

The Second and Ninth Circuits are thus split with respect to both reasoning and result, and respondents do not seriously argue otherwise. They instead demur to certiorari by suggesting that petitioners might in the future bring an "as applied" challenge that may achieve an outcome similar to that currently found in *Pataki*. Opp. 12, 14. This is pure fancy, and nothing short of a complete rewrite of the Ninth Circuit's categorical opinion.

Absent reversal, there is *no* possibility that any court in the Ninth Circuit could hold AB 1889 preempted. The district court and future Ninth Circuit panels would be bound by the *en banc* court's unequivocal ruling that noncoercive speech is not "protected" under *Garmon* and is not an activity free from regulation under *Machinists*. That holding is not only law of the case, it is law of the circuit. *See United States v. Rodriguez-Lara*, 421 F.3d 932, 943 (9th Cir. 2005); *In re Rainbow Magazine, Inc.*, 77 F.3d 278, 281 (9th Cir. 1996). Indeed, under the Ninth Circuit's rationale, it is irrelevant that California chose to use its spending power in AB 1889: If *Garmon* and *Machinists* do not speak to noncoercive employer speech, as the *en banc* court held, California could directly restrict such speech with impunity.

The Ninth Circuit also specifically disagreed with the Second Circuit over whether and how spending restrictions

are preempted. The Ninth Circuit squarely held that restrictions like AB 1889 do not "burden" noncoercive employer speech because it restricts only the use of money obtained from the "state," but not other funds of the employer. *See* Pet. App. 17a ("In restricting the *use* of state funds, California has not made employer neutrality of the substantive terms of employment between employer and employee a condition for the *receipt* of state funds.") (emphases in original). In contrast, as noted, the Second Circuit held preempted restrictions on money derived from the state, such as contracts, cost-reimbursement programs, and other money not viewed as a "gift" from the state. *Pataki*, 471 F.3d at 102 n.7 ("In distinguishing between money that can be said to belong to the State and money that belongs to the employers, our analysis differs from that of both majority and dissent in *Lockyer*[.]").

Lest there be any doubt, the *en banc* court expressly blessed AB 1889's restrictions on "state program" funds that *exclude* reimbursement for union-related expenses. The Ninth Circuit explained that Medi-Cal, one of the "state programs" governed by AB 1889, was not preempted because it was "designed only to cover the costs of services performed" and that, pursuant to a federal statute, "costs incurred for activities directly related to influencing employees respecting unionization may not be included." Pet. App. 35a n.23 (internal quotation marks, emphases, and citations omitted). But the Second Circuit used this very same factor to conclude that New York's law *was* preempted. As the *Pataki* court explained, a state can accomplish its goals of "mak[ing] sure that [it] does not end up paying labor costs" and "saving money" by "limiting the kind of costs for which it will reimburse program participants." 471 F.3d at 104, 108. Having thus ensured that public funds are not used for union-related speech, the state has no justifiable interest in also "preventing [employers] from using their proceeds in a particular way." *Id.* at 103. Accordingly, the question remanded in the

Second Circuit—whether the state reimburses costs associated with union organizing—is legally irrelevant in the Ninth Circuit (indeed, is a factor *precluding* preemption).

Respondents' repeated references to "facial" challenge do not explain, alter, or ameliorate the split with the Second Circuit. Respondents' use of the term "facial" is misleading: Although petitioners do challenge the plain text and obvious effect of AB 1889, the Ninth Circuit did not resolve the question of NLRA preemption on the basis of the *Salerno* standard. *See* 481 U.S. at 751. The Ninth Circuit held that AB 1889 was permissible because *Garmon* and *Machinists* did not apply to it as a matter of law; it did not hold that AB 1889 escaped preemption because it *might* be applied in a manner that does not frustrate federal labor policy.[1] The word "facial" cannot harmonize the Second and Ninth Circuit decisions for the additional reason that the posture of both cases is identical: Petitioners in this case and plaintiffs in *Pataki* sought injunctive and declaratory relief that the respective state statutes are preempted by the NLRA. The posture of this case plainly did not compel the *en banc* court to uphold the challenged provisions of AB 1889 in their entirety. The Ninth Circuit is at loggerheads with the Second Circuit not because of any procedural differences, but because the former takes the legal position that restrictions on using money derived from the state for noncoercive

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[1] Each of the *en banc* court's references to "facial" challenge came in the context of addressing the First Amendment, not NLRA preemption. *See* Pet. App. 7a (citing *Rust v. Sullivan*, 500 U.S. 173 (1991), a First Amendment case); Pet. App. 34a (discussing First Amendment issue). The opinion's conclusion bears this out, as the qualifier "on their face" modifies only the First Amendment holding. Pet. App. 36a (holding that challenge provisions "are not preempted under either *Machinists* and *Garmon* and do not on their face infringe plaintiffs' First Amendment rights"). The first two Ninth Circuit panel opinions, furthermore, expressly rejected the significance of the *Salerno* standard with respect to NLRA preemption. *See* Pet. App. 90a-91a, 133a-135a.

employer speech are consistent with federal labor policy, whereas the latter takes the legal position that state restrictions on the use of money that an employer has earned impermissibly burden noncoercive employer speech.

In short, given the breadth of the Ninth Circuit's holding, there are no facts that petitioners could develop in future that would allow the district court to strike down AB 1889. In an obvious attempt to confuse this point, respondents (Opp. 13-14) seize upon an isolated statement from the *en banc* court's *First Amendment* ruling,[2] where it claimed that certain arguments made in the dissent went beyond the scope of petitioners' "facial challenge . . . and the record before us." Pet. App. 34a. It is clear, however, that the majority was rejecting the dissent's argument that AB 1889 "co-opts the payment for goods and services and profit realized under a contract" as *mischaracterizing* the program, which the majority believed "merely refused to fund such [union-related] activities out of the public fisc"—not because of any disputed facts to be resolved on remand or in an "as applied" challenge. Pet. App. 33a-34a (internal quotation marks and citations omitted). Given the majority's legal conclusion that AB 1889 is constitutional because "an employer retains the freedom to raise and spend its own funds," Pet. App. 32a, this passage can hardly be seen as an invitation from the *en banc* court for further factual development on the First Amendment issue, let alone on the analytically separate and distinct NLRA preemption issue. In sum, the Ninth Circuit's preemption ruling did not turn upon any disputed issues of fact, and it is that legal ruling on which certiorari is sought.[3]

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[2] The Ninth Circuit raised and resolved the First Amendment issue *sua sponte*; pursuant to a stipulation, petitioners and respondents agreed to appeal only the NLRA preemption issue. *See* Dkt. 168 (SER761).

[3] In perhaps its most desperate attempt to avoid certiorari, respondents speculate that, under the canon of constitutional doubt, "state funds" under AB 1889 might be interpreted to exclude "profits" received under

B. The Seventh and Ninth Circuits Take Different Approaches To NLRA Preemption

Respondents argue that the Seventh Circuit's decision in *Metropolitan Milwaukee Ass'n of Commerce v. Milwaukee County*, 431 F.3d 277 (7th Cir. 2005), would be relevant only if AB 1889 prevented employers "from using their private funds to support or oppose union organization." Opp. 15. But the Seventh Circuit made clear that a spending restriction nominally designed to protect the public fisc is preempted where, as here, it is truly designed to affect the employer's labor policies. *Metro. Milwaukee*, 431 F.3d at 279. In the course of determining whether Milwaukee County was acting as proprietor or regulator, the Seventh Circuit inquired whether the restriction on noncoercive employer speech with respect to County contracts would affect employers' labor relations on non-County contracts. *See id.* at 279-82. It determined that the ordinance would have a "spillover effect" on employers' speech unrelated to County contracts in light of the difficulties of maintaining separate labor policies for County and non-County contracts. *Id.* at 279. Here, it is undisputed that California's spending restriction was not designed to reduce state expenditures, but to regulate labor relations, and would be preempted by the

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state programs or grants. Opp. 19. But this ignores that the Ninth Circuit found AB 1889 constitutional without any limiting construction, or any hint that it might be suspect if it applied to "profits." That canon of interpretation, moreover, applies only where the constitutional reading is reasonably available, *see Clark v. Martinez*, 543 U.S. 371, 381-82 (2005), and respondents' purported "profit" carve-out finds no purchase in the text of AB 1889. Even were such an interpretation possible, it would be no palliative and, indeed, would result in an utterly unworkable system. Who would determine the "profit" derived from a state program or grant of $500,000? If an employer says that $60,000 is profit, and that it spent *that* money to oppose a union-organizing campaign, the union would file a lawsuit the next day challenging the employer's accounting and seeking treble damages and attorney's fees.

Seventh Circuit on that basis alone. Moreover, it is clear that AB 1889 also has a "spillover effect" burdening employers' ability to speak to employees not directly working on a state contract or program, because of the difficulty and litigation risks of segregating funds. *See* Pet. 23-27. Thus, had the Ninth Circuit followed the Seventh Circuit's preemption analysis, it would have easily concluded that AB 1889's restriction on "state funds" has an illegitimate regulatory purpose and, in any event, has an impermissible effect on employers' relations with employees involved in non-state work.[4]

C. The Preemption Issue Can And Should Be Resolved Now

Respondents argue that any burden imposed by AB 1889 cannot be determined without "factual findings." Opp. 17.

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[4] Respondents also defend the Ninth Circuit's decision on the merits by arguing that Congress has tacitly approved AB 1889 by enacting similar spending restrictions in three federal statutes. *See* Opp. 3-4, 23. Congress, of course, is not "preempted" from enacting federal laws consistent with the United States Constitution. *See, e.g., Smith v. Nat'l Steel & Shipbuilding Co.*, 125 F.3d 751, 755 (9th Cir. 1997) (preemption under the Supremacy Clause "is only implicated when a case involves a conflict between a federal and a state law"). These three project-specific spending restrictions, moreover, cannot plausibly be interpreted as an implicit repeal of section 8(c) of the NLRA and the longstanding federal labor policy in favor of noncoercive speech. *Cf. Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1122 (1st Cir. 1989) (refusing to "infer implicit congressional approval" of Massachusetts's regulations where federal agencies had adopted or approved rules "not dissimilar in spirit from the Massachusetts regulations" because the agency actions were the "products of federal, not state, authority," which is "a critical distinction"). Indeed, the expert agency entrusted with safeguarding federal labor policy has concluded that these narrow federal programs do not support *state* regulation of noncoercive employer speech. *See* NLRB *Amicus* Brief at 28, *available at* 2003 WL 22330725 (noting that Congress had the authority to impose these restrictions "in discrete federal health and social welfare programs," but that "[i]t does not follow at all that a state may do likewise").

Yet when this Court determined that similar administrative burdens (including the creation of segregated accounts) had the effect of deterring speech, it did not refer to any factual findings, but rather ascertained the practical effect of the statute by evaluating its textual commands. *See FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 253-55 (1986). Respondents' argument, moreover, wholly miscomprehends the nature of NLRA preemption: *Garmon* deals with "potential conflict" in "classes of situations," 359 U.S. at 242, and *Machinists* demarcates zones of activity that are not "regulable by States," 427 U.S. at 149. The prophylactic nature of NLRA preemption "*precludes* an *ad hoc* inquiry into the special problems of labor-management relations in a particular set of occurrences." *Garmon*, 359 U.S. at 242 (emphasis added). Thus, to guard against potential conflicts with the federal labor scheme, courts routinely address the issue of NLRA preemption before the state law has been enforced. *See, e.g., Metro. Milwaukee Ass'n of Commerce v. Milwaukee County*, 325 F.3d 879, 882-83 (7th Cir. 2003) (pre-enforcement review because NLRA preemption raises "almost purely legal issues that are quintessentially fit . . . for present judicial resolution") (internal quotation marks and citations omitted); *Employers Ass'n, Inc. v. United Steelworkers*, 32 F.3d 1297, 1299 (8th Cir. 1994) (pre-enforcement review where state "statute permanently and substantially shifts the terms of bargaining in favor of the union"). As the D.C. Circuit has recognized, the very existence of a law may interfere with the NLRA by altering behavior. *See Chamber of Commerce v. Reich*, 57 F.3d 1099, 1100 (D.C. Cir. 1995) ("[T]he mere existence of the [Executive] Order alters the balance of bargaining power between employers and employees by *creating a disincentive* for employers to hire replacement workers and thereby depriving them of a significant economic weapon in the collective bargaining process.") (emphases added).

The deterrent effects of AB 1889 are patent and do not necessitate the resolution of any issues of fact. AB 1889

prohibits using some part of the employer's funds for labor speech, which is a burdensome restriction on freedom in all circumstances. *See* Pet. 4-6. The manifest and intended effects of AB 1889 are only confirmed by the affidavits in the record, *see*, *e.g.*, Dkt. 34 (SER 54-58), as well as the evidence of the unions' use of AB 1889, before it was enjoined, to gain leverage against employers in ongoing union organizing campaigns, *see* Pet. App. 67a-70a.

Given the clear split on this legal issue, percolation is unnecessary and would exacerbate the very problem that Congress sought to foreclose in enacting the NLRA. "[O]ne of the basic purposes of the NLRA [is] to establish a uniform national labor policy" in order to shield both businesses and labor unions from the vagaries of state and local laws. *Int'l Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212, 221 n.17 (1982). Because at least 15 other states are poised to enact laws similar to AB 1889, delaying certiorari review would allow the very confusion and inconsistent legal obligations that the NLRA was specifically designed to foreclose. As this Court concluded in an analogous context, if a state law allegedly "is void because it hinders" a national policy favoring "the commercial development of atomic energy, delayed resolution would frustrate one of the key purposes of the [Atomic Energy] Act." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 202 (1983) (internal quotation marks and citation omitted). In sum, this matter requires the Court's immediate attention, and there is no question that the Ninth Circuit's preemption ruling is ripe for certiorari review, and reversal.

Respectfully submitted,

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